TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 247.

HARVEY B. WILMOT, PLAINTIFF IN ERROR,

vs.

ENOCH R. MUDGE ET AL.

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FILED OCTOBER 10, 1878.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the superior court of the commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Enoch R. Mudge et al., plaintiffs, and Harvey B. Wilmot, defendant, in an action of tort, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Harvey B. Wilmot, defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the tenth day of July, in the year of our Lord one thousand eight hundred and seventy eight.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

2 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the judges of the superior court for said county make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court *court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Jos. A. Willard, clerk of said superior court, have hereto set my hand and the seal of said court this fifteenth day of July, A. D. 1878.

[SEAL.] JOS. A. WILLARD, *Clerk.*

3,4 COMMONWEALTH OF MASSACHUSETTS:

I, Lincoln F. Brigham, chief justice of the superior court of the commonwealth of Massachusetts, do certify that Jos. A. Willard, esq., whose signature is affixed to the papers hereunto annexed, is clerk of said superior court, within and for the county of Suffolk, and hath the keeping of the files, records, and proceedings of said court, within and for said county; also of the late court of common pleas, within and for said county, and of the late superior court of the county of Suffolk, aforesaid; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, & 24, of the files, records, and proceedings of the said superior court, is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said court to be hereunto affixed, this fifth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] LINCOLN F. BRIGHAM,
Chief Justice of the Superior Court.

5 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, greeting:

Know ye, that among our records of our superior court, for the said county of Suffolk, it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the sheriffs of our several counties, or their deputies, greeting:

[L. S.] We command you to attach the goods or estate of Harvey B. Wilmot, of Cambridge, in our county of Middlesex, trader, having his usual place of business in Boston, in our said county of Suffolk, under the style of H. B. Wilmot and Company, to the value of
6 five thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of October next, then and there in our said court to answer unto Enoch R. Mudge, Joseph Sawyer, Gustavus V. Fox and Charles H. Joy, all of Boston, in our said county of Suffolk, and Lowell Lincoln, of the city, county, and State of New York, merchants and copartners, under the firm and style of E. R. Mudge, Sawyer and Company, having their usual place of business in said Boston. In an action of tort.

B.

7 SUFFOLK, *ss:*

Superior court, Oct. term, 1876.

E. R. MUDGE ET AL.
vs.
HARVEY B. WILMOT.

Plaintiffs' declaration.

And the pl'ffs say the d'f't, to induce them to sell property on credit

to said d'f't, falsely represented to the pl'ffs that he was then a man of large property and able to pay his debts; that the sales in his business were then from one hundred and fifty thousand dollars to two hundred thousand dollars per year—all retail—that he had then a capital of fifty thousand dollars in his business, and that said capital was then all his own.

And thereupon the pl'ffs, believing said representations to be true, were induced thereby to sell, and did sell to the d'f't the goods mentioned in the account hereto annexed, and gave said d'f't credit for the price of said goods, being three thousand and twenty-four and ninety-four one-hundredths dollars, for the term of sixty days from the
8 twelfth day of July, in the year eighteen hundred and seventy-six.

And said d'f't was not at the time said representations were so made a man of property, nor able to pay his debts, but was then insolvent, and the sales in his business were not, at the time when said representations were so made, from one hundred and fifty thousand dollars to two hundred and fifty thousand dollars per year, but were much less than one hundred and fifty thousand dollars, and the d'f't did not then have a capital of fifty thousand dollars, but had no capital in said business and was insolvent, all of which the d'f't well knew.

And the d'f't has not paid the pl'ffs for said goods, or any part thereof.

BROOKS, BALL & STORY,
Pl'ffs' Att'ys.

9 *Account annexed.*

BOSTON, *June 30th*, 1876.

Mess. Wilmot & Co. bought of E. R. Mudge, Sawyer & Co., 15 Chauncy st.

Terms: 60 d'ys from July 12, 1876.

Items.	Style.	Case.	Pieces.	Yards.
	⅝ Elysian:			
1.	130 blk.		No. 3784.....	32⅛
2.			3785.....	40⅜
3.			3783.....	32
4.	" "	11983	3 pieces.....	92⅜
5.	195 blue	12201	3 "	80⅞
6.	195 blk.	12220	6 "	162⅝
		No.		
7.	126 blk.	8001.....		29
8.		3984		21⅛
9.		3985.....		26⅞
10.		3581.....		27⅜
11.		3986.....		30¼
12.		5675.....		31⅝
				607⅜—400—2431.50
	⅝ cotton warp Elysian:			
13.	180	12274	6.....179⅞	
14.	179	12275	1..... 30⅞	
15.	180	"	3.....105⅝	316⅛—187½....593.44
				3024.94

10 To the damage of the said pl'ffs, as they say, the sum of five thousand dollars, which shall then and there be made to appear with other due damages, and have you there this writ with your doings therein.

Witness Lincoln F. Brigham, esquire, at Boston, the nineteenth day of September, in the year of our Lord one thousand eight hundred and seventy six.

JOS. A. WILLARD, *Clerk.*

On which said writ is the following return by the officer who served the same:

SUFFOLK, *ss:*

BOSTON, *September* 19, 1876.

By virtue of this writ, I have this day attached as the property of the within named Harvey B. Wilmot, the same goods and chattels that I had previously attached on five other writs against said Wilmot, returnable at the same time and place as this writ, this being the sixth
11 attachment thereon by me made; on the same day I gave to said Wilmot a summons for his appearance to answer at court as within directed.

HARROUS MERRILL,
Dep'ty Sheriff.

Fees & travel, 1.58.

On the first Tuesday of October A. D. 1876, the pl'ffs appeared by their attorneys and entered the above action, and the d'f't also appeared by his attorneys and filed the following:

12 C.

SUFFOLK, *ss:*

Superior court, October term, 1876.

E. R. MUDGE ET AL.
vs.
HARVEY B. WILMOT.

Answer of defendant.

Now comes the said d'f't, and for answer upon his personal knowledge denies that he made either or any of the representations mentioned in the pl'ffs' declaration; he denies that he represented to the pl'ffs' *to the pl'ffs'* that he was a man of large property; denies that he represented that he had a capital of fifty-thousand dollars, all his own; he denies that he made any false, untrue, or fraudule't representations wha tever; denies that the pl'ffs were induced to sell him said goods upon or by any false representations of his. He says that he is and has been for eight years last past a merchant tailor doing business in the store number two hundred sixty-three on Washington street in Boston; that on or about the first of July, 1876, in the usual course of trade and business and without any false or fraudulent representations what-
13 ever, he purchased of the pl'ffs certain goods to be used by him in his said business; that thereafter on the twenty-third day of September, 1876, under and by virtue of due petitions and proceedings

(begun after said purchase) under the laws of the United States relating to bankruptcy, and particularly under section No. 5103 A, of the Revised Statutes of the United States, sec. 17, act of June 22, 1874, after due notice to all his creditors, including the pl'ffs, at a meeting called by order of the district court of the United States, and had on the twenty-third day of September, A. D. 1876, of which the pl'ff's had due notice, the creditors of d'f't voted and resolved to receive and take forty-five per cent. of his indebtedness to his creditors respectively, excepting such as were entitled to be paid in full under the laws of the United States, in full payment of their several claims against him, payable in the manner set forth in the said resolution, and said resolution was duly passed and was duly confirmed by the signature of the def't and the requisite signatures in number and value of all his creditors. That thereafter in the district court of the United States, upon due proceedings had,
14 as to all of which the pl'ffs had due notice, and upon and after hearing all *all* parties interested, the said resolutions for composition was heard by said court; and it was on the ninth day of October, A. D. 1876, by said district court ordered to be then recorded as by the order of said court, a copy of which is hereto annexed, fully appears.

Thereafter immediately the amount of forty-five per cent. of his indebtedness to the pl'ffs and their costs was duly offered and tendered to the pl'ffs by him in the way and manner set forth in said resolution so confirmed and recorded as aforesaid; but the pl'ffs wrongfully refused to take or accept it, and the d'f't is now and ever has been ready to pay to the pl'ffs the amount due to them, and ordered to be paid them under said composition. That the names and address of the pl'ffs, with the amounts due to them, are and were shown in the statement of the d'f't produced at the meeting before the register at which said resolution was passed as aforesaid, and they in fact had due notice of all said meetings and hearings; and that by virtue of said proceed-
15 ings and resolution and order and record by said district court, he was on the said ninth day of October, A. D. 1876, in effect and in law, discharged from all his liability and indebtedness to the pl'ffs for the goods had or purchased of them.

By his att'ys:

RICHARDSON AND HALE.

Filed November 1st, 1876.

16 A.

Order on resolution for composition.

In the district court of the United States for the district of Massachusetts.

In the matter of Harvey B. Wilmot. In bankruptcy No. 6157.

And now on this ninth day of October, A. D. 1876, this cause came on to be heard upon the resolution for composition heretofore presented to the court; and upon hearing all persons desiring to be heard thereon, it appearing to the court that said resolution was duly passed in the manner directed by the statute in this behalf, and the court being satisfied that said resolution is for the best interest of all concerned, it is ordered that the same be forthwith recorded, that the statement of the debtor as to his debts and assets, presented with the said resolution, be forthwith

filed, and that as soon as the terms of said resolution have been complied with, written evidence of such compliance shall be filed in court.

Any person interested may apply to the court at any time for further directions, as provided by law and as he may be advised.

Witness the honorable John Lowell, judge of the said court, and the seal thereof, at Boston, in said district.

[L S.] EDWARD DEXTER,
Clerk of said Court.

17 I, Edward Dexter, clerk of the district court of the United States for the district of Massachusetts, hereby certify that the within is a true copy of the original record in said clerk's office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said court this day of , A. D. 187 .

EDWARD DEXTER, *Clerk.*

(Indorsed:) No. . In bankruptcy. Order on resolution for composition. Harvey B. Wilmot. Filed in court this day of Oct., A. D. 1876.

And thence the action was continued to the January term, 1877, when the pl'ffs filed the following motion:

SUFFOLK, *ss:*

Superior court. January T., 1877.

ENOCH R. MUDGE & AL.
vs.
HARVEY B. WILMOT.

And now come the pl'ff's in the above entitled suit and represent that the same was commenced on the nineteenth day of September, 1876, that prior thereto, to wit, on the ninth day of said September a
18 petition in bankruptcy had been filed by the above named d'f't in the district court of the United States for the district of Massachusetts upon which proceedings were then pending; that all the property of said d'f't was then in the constructive custody and charge of said district court and not liable to attachment; that subsequently, thereto, to wit, on the ninth day of October, 1876, a resolution of composition whereby said debtor offered to pay to his creditors forty-five (45) per cent. of their respective claims in satisfaction thereof in the manner in said composition set forth was duly recorded by said district court.

That the above-entitled action is in tort for false representations by the d'f't, and said right of action is not defeated or discharged by the recording of said resolution of composition nor by any discharge under the laws of the United States relating to bankruptcy.

That subsequently to the recording of said resolution of composition, to wit, on the twelfth day of October, A. D. 1876, said Wilmot, by
19 a mortgage of that date, purported to convey in mortgage to Sumner Applin, of Cambridge, in Massachusetts, all his stock in trade of clothing, made and in process of manufacture, for the consideration therein stated of fifty-five thousand dollars, to secure all notes dated September 1st, 1876, which said Applin had or should sign or endorse for said Wilmot, which mortgage was recorded with records of

mortgages of personal property in the city of Boston, lib. 282, fol. 17, on said twelfth day of October, A. D. 1876. That said Wilmot has subsequent'y to the execution of said mortgage sold a portion of said stock in trade and purchased other goods, which have been added to said stock. That your petitioners are apprehensive that said Wilmot may become insolvent and unable to carry out his said composition or to meet his liabilities since incurred, and your petitioners have no security to satisfy the judgment which they may obtain in the above-entitled case, and were unable, for the reason hereinbefore set forth, to obtain any security by attachment or otherwise at the time of commencing said suit; that they are unable to ascertain how much, if any, of said stock is now covered by said mortgage, or whether said mortgage is valid, or, if valid, whether the same has been in whole or in part discharged.

Wherefore they pray this honorable court to direct by special precept, in accordance with the provisions of chapter 167, of the acts of the legislature of Massachusetts of 1876, that an attachment may be made to secure the judgment which the plaintiffs may obtain in said cause of the property now belonging to the d't't, and that said Sumner Applin, the above named mortgagee, may be summoned therein as the trustee of said Wilmot, such precept to be returnable as may be directed by said court.

JOSEPH SAWYER,
One of and in behalf of said Pl'ff.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

MARCH 24, A. D. 1877.

Then personally appeared the above-named Joseph Sawyer and made oath that the statements contained in the foregoing petition by him subscribed are true.

Before me.

ALBERT D. BOPON,
Justice of the Peace.

Filed March 24, 1877.

And, after a full hearing, it was ordered by the court as follows:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior court, January T., 1877.

ENOCH R. MUDGE ET AL., PL'FFS,
vs.
HARVEY B. WILMOT, D'F'T.

And now, upon motion the pl'ffs in the above action, and upon good cause shown, it is ordered that a special precept issue, according to the provisions of ch. 167, of the laws of 1876, to attach the goods, chattels, and lands of the d'f't and the goods, effects, and credits of said d'f't in the hands and possession of Sumner Applin or in the hands and possession of either of them, to secure the judgment which the pl'ffs may obtain in said cause.

By the court.

JOS. A. WILLARD, *Clerk.*

Filed March 24, 1877.

And thereupon a new writ was ordered to attach the d'f't's property, returnable the first Tuesday in May, A. D. 1877, and said writ was duly returned into our said court.

And thence the same was continued to the April term, 1877, when, after a full hearing, the court returned the following:

SUFFOLK, *ss*:

Superior court, April term, 1877.

E. R. MUDGE ET ALS., PL'FFS,
HARVEY B. WILMOT, D'F'T.

In the above action, jury trial being waived, I find for the plaintiff, and assess damages in the sum of three thousand one hundred twenty-seven dollars seventy-nine cents ($3,127.79).

23 WM. J. GARDNER,
Jus. Superior Court.

Whereupon the d'f't alleged exceptions to the ruling of the court in matters of law, and the same being reduced to writing, are presented to the court and are as follows:

24 *Defendant's exceptions.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior court.

E. R. MUDGE ET ALS.
v.
HARVEY B. WILMOT.

This is an action of tort to recover damages of the defendant for obtaining the goods named in the schedule annexed to the writ of the plaintiffs, by false and fraudulent representations. The declaration and answer may be referred to and are made part hereof. The damages claimed were the price of the goods agreed upon at the sale, and interest thereon.

At the trial it appeared that the plaintiffs sold the goods in the schedule to the defendant about June 30, 1876, on sixty days' credit; and the plaintiffs offered evidence tending to show that at the time of the sale the defendant made substantially the representations alleged in the declaration, and told the plaintiffs that he was solvent and had a capital of $50,000 in his business, all his own, and that these statements were false. Counsel for the plaintiffs then asked one of the plaintiffs who sold the goods to the defendant and who was upon the witness stand called by the plaintiffs, "What induced you to sell the goods to the defendant?" The defendant objected to the question, but the court allowed it, and the witness answered that he was so induced by the said representations of the defendant, and defendant excepted.

The defendant then put in evidence his composition, by which it appeared than on the ninth day of September, 1876, he filed a petition in bankruptcy in the district court of the United States for this district, but was not adjudicated a bankrupt; that upon his petition thereafter for a meeting of his creditors to consider the offer of a composition for the payment of forty-five cents on the dollar, of all claims against him provable in bankruptcy except such as were entitled, under the bank-

rupt law, to be paid in full, a meeting was called under the direction of the court, and had before a register; and said Wilmot was present, and then and there produced schedules of all of his assets and debts, and of all persons having claims against him, including the names of the
25 plaintiffs, their address, and the amount due to them, correctly; that the creditors of said Wilmot at said meeting, by the requisite number and amount voted and resolved to accept the said offer, and it was duly confirmed in writing by the signature of the debtor and the requisite number and amount of the creditors of said Wilmot to make it operative, and by order of the said court a meeting was duly called and held before said court upon the question of recording said resolution; and after a hearing thereon, the said resolution was duly ordered by the court to be recorded; and the court made the order, a copy of which is annexed to the answer, which has not been vacated or annulled.

That the defendant duly made offer and tender of the amount due to the plaintiffs, according to said resolution and order; but they refused to accept it, and took no part in any of the bankruptcy proceedings.

The plaintiffs did not contend that the proceedings of the composition were irregular, but only that the composition was no bar to the action, their claim was not discharged or affected thereby, because the goods were obtained under the circumstances hereinbefore stated.

The defendant requested the court to rule that said composition operated as an accord and satisfaction of the claim in suit, and as a discharge of it, and was a bar to this action. But the court refused so to rule and found the facts substantially as set forth in the declaration for the plaintiff, and assessed the damages for the amount of the agreed price of the goods and interest.

The defendant excepted to all said rulings and refusals to rule, and prays that his exceptions may be allowed.

By his attorneys:

RICHARDSON & HALE.

Examined and allowed.

WM. S. GARDNER.
Judge Superior Court.

And said exceptions are allowed and signed by said presiding judge, and the questions of law thereby raised passed to the supreme judicial court for the commonwealth for revision. And thence the same was continued to await from term to term to the present April term, 1878.

26 And now a rescript from said supreme judicial court for the commonwealth is filed as follows:

COMMONWEALTH OF MASSACHUSETTS:

Supreme judicial court for the commonwealth, at Boston, January T, 1878.

In the case of Enoch R. Mudge & others vs. Harry B. Wilmot, pending in the superior court for the county of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Exceptions overruled.

By the court.

GEORGE W. NICHOLS, *Clerk.*

JUNE 27, 1878.

REC. 247—2

Brief statement of the grounds and reasons of the decision.

27 "An action on a debt which would not be barred by a certificate of discharge under the bankrupt act is not barred by a composition under the act of Congress, 1874," filed June 27, 1878.

It is therefore considered by the court, on the twenty-eighth day of June, 1878, that the pl'ffs Mudge, Sawyer, Fox, Joy and Lincoln recover of said d'f't Wilmot the sum of three thousand three hundred fifty-three dollars and eleven cents damages and costs of suit taxed at seventy-eight dollars and seventy-four cents.

All and singular, which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said superior court to be hereto affixed.

Witness Lincoln F. Brigham, esquire, chief justice of our said
28 superior court, at Boston, in said county of Suffolk, this fifth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOS. A. WILLARD, *Clerk.*

29 *Bond on writ of error.*

Know all men by these presents, that we, Harry B. Wilmot of Cambridge, in the county of Middlesex, principal, and Henry Tower of Hudson, and Alonzo Tower of Concord, both in the county of Middlesex, aforesaid, in the commonwealth of Massachusetts, as sureties, are held and firmly bound unto Enoch R. Mudge, Joseph Sawyer, Gustavus V. Fox and Charles H. Joy, all of Boston, in the county of Suffolk, and Lowell Lincoln, of the city, county and State of New York, copartners under the firm of E. R. Mudge, Sawyer & Co., plaintiffs, in the full and just sum of five thousand dollars, to be paid to the said Mudge, Sawyer, Fox, Joy and Lincoln, copartners, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the eighth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately at a superior court within and for the county of Suffolk and commonwealth of Massachusetts, in a suit depending in said court between said Enoch R. Mudge, Joseph Sawyer, Gustavus V. Fox, Charles H. Joy and Lowell Lincoln, plaintiffs, and said Harvey B. Wilmot, defendant, judgment was rendered against the said Harvey B. Wilmot, and the said Harvey B. Wilmot having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mudge, Sawyer, Fox, Joy and Lincoln, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Harvey B. Wilmot shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

"Four" erased and "five" interlined before signing.

HARVEY B. WILMOT. [L. S.]
HENRY TOWER. [L. S.]
ALONZO TOWER. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN G. STETSON.

Approved:

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:
[SEAL.]

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

30 The United States of America, to Enoch R. Mudge, Joseph Sawyer, Gustavus V. Fox and Charles H. Joy, all of Boston, in the district of Massachusetts, and Lowell Lincoln, of the city, county and State of New York, merchants and copartners under the firm and style of E. K. Mudge, Sawyer & Company, having their usual place of business in said Boston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the superior court of the commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk in said commonwealth, wherein Harvey B. Wilmot of Cambridge, in said district and commonwealth of Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this tenth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

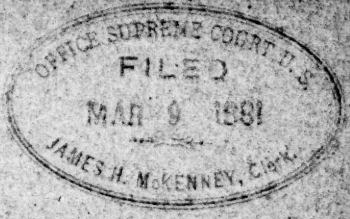
NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

31 BOSTON, *Aug.* 9, 1878.

We hereby accept and acknowledge service of the within writ and summons upon us.

BROOKS, BALL & STOREY,
For d'f't in error.

(Indorsement on cover:) No. 247. Harvey B. Wilmot, plaintiff in error, vs. Enoch R. Mudge et al. Massachusetts superior court. Filed 10th October, 1878.



Supreme Court of the United States,

NO. 247.

HARVEY B. WILMOT, PLAINTIFF IN ERROR,

v.

ENOCH R. MUDGE ET ALS.

WRIT OF ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES B. RICHARDSON,
EDWIN B. HALE, } *Counsel.*

Supreme Court of the United States,

No. 247. OCTOBER TERM, 1880.

HARVEY B. WILMOT, *Plaintiff in Error,*

v.

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STATEMENT OF THE CASE.

This cause is brought to this Court by writ of error to the Superior Court of the Commonwealth of Massachusetts, after final determination and decision of the same, by the Supreme Judicial Court of said Commonwealth (and after it had been remanded by said Supreme Judicial Court to said Superior Court for judgment and entry of final judgment), on the ground that the decision and judgment was against a statute, and the rights and privileges of the plaintiff in error under a statute of the United States, to wit, Sect. 17 of the Statute approved June 22, 1874, providing for "composition with creditors."

Both parties, in 1876, were merchants in Boston. The plaintiff in error, on June 30, 1876, purchased of the defend-

ants in error goods,— cloth,— described in the "account annexed" (see page 3 of the record), of the value and agreed price of $3,024.94. The action was begun by writ dated Sept. 19, 1876, returnable to said Superior Court, at the October term following. The declaration was in "tort," in which the defendants in error alleged that the plaintiff in error, to induce them to sell said goods to him, falsely represented to them that he was a man of large property, and able to pay his debts; that the sales in his business were then from one hundred and fifty thousand to two hundred thousand dollars per year, — all retail; that he had a capital of fifty thousand dollars then, all his own; that said representations were not true; that plaintiff in error was then insolvent, as he well knew; that no part of the price of said goods has been paid. (See "plaintiff's declaration," page 2 of record.) To which action plaintiff in error answered, denying the allegations of false representations, and set up in bar of the action a composition with his creditors, under Sect. 17 of the Statute of the United States, approved June 22, 1874. (See answer of defendant, page 4 of record.")

At the trial of said action at the April term of said Superior Court, 1877, it appeared that on the ninth day of September, 1876, the plaintiff in error filed a petition in the District Court of the United States for the District of Massachusetts in bankruptcy at Boston; that thereafter, in the same month, but without adjudication as a bankrupt, upon his offer, duly filed in said Court, under Sect. 17 of the Act of Congress of June 22, 1874, relating to a composition, a meeting of his creditors was called to consider the offer made by him for a composition with his creditors for a *pro rata* payment to them of forty-five cents on a dollar in satisfaction of all claims against him, except to secured creditors, and creditors, if any, who were entitled to a priority. At which meeting of the creditors the plaintiff in error was present

and produced a statement, showing the whole of his assets and debts and the names of the creditors to whom such debts respectively were due, including the names and addresses of the defendants in error and the amount due to them, correctly shown, as provided by said Sect. 17; that the creditors who were assembled at said meeting, of which meeting the defendants in error had due notice, duly resolved to accept said offer, which resolution was duly confirmed by the signature of the debtor and the number and amount of the creditors required to make it operative and binding, which resolution and statement were produced to the said District Court, and a meeting of the creditors was then duly called by said Court to consider whether it should be recorded; and after due notice to all creditors, including the defendants in error, and a hearing thereon, said resolution to accept said offer was adjudged to be for the best interest of all concerned, and was ordered to be recorded, and it was confirmed and recorded. (See "A," "Order on Resolution for Composition," on page 5 of record.) That all the proceedings of the composition were regular; but the defendants in error did not attend any meeting of the creditors or take any part in the proceedings. The plaintiff in error duly tendered to defendants in error the amount of the percentage due to them under said composition, which they refused to receive on the ground that their said claim for said goods was not discharged or barred by said composition.

The plaintiff in error requested the Court to rule that said composition and proceedings operated as an accord and satisfaction of the claim in suit; and that it was a bar to said action; but the Court refused so to rule, and found the facts substantially as set forth in the declaration; and assessed the damage for the amount of said goods and interest. (See "defendant's exceptions," pages 8 and 9 of record.)

Exceptions were duly taken to said rulings, which were duly entered into the Supreme Judicial Court of said Commonwealth, and were there argued; and on June 27, 1878, said Court overruled said exceptions, on the ground that "an action on a debt which would not be barred by a certificate of discharge under the Bankrupt Act is not barred by a composition under the Act of Congress of 1874," and decided that said composition was not a bar to said action, and remanded the same to said Superior Court for final judgment. And the plaintiff in error brings this cause by writ of error to this Court on the ground that the said decision is against a statute of the United States, and his right and privilege under said Sect. 17 of said Statute of the United States, approved June 22, 1874.

ASSIGNMENT OF ERRORS.

1. The Court erred in ruling and deciding that "an action on a debt which would not be barred by a certificate of discharge under the Bankrupt Act, is not barred by a composition under Sect. 17 of the Statute of the United States approved June 22, 1874."

2. The Court erred in holding and deciding that the said composition of the plaintiff in error with his creditors was not a bar to this claim, or to this action thereon, of the defendants in error against him.

BRIEF OF PLAINTIFF IN ERROR.

I.

The provisions for a debtor's composition with his creditors are all contained in Sect. 17 of the Statute of the

United States, approved June 22, 1874, entitled "An act to amend and supplement an act, entitled an act to establish a uniform system of bankruptcy throughout the United States approved March 22, 1867, and for other purposes"; in which it is declared, that "the provisions of a composition, accepted by such resolution, made in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor, produced at the meeting at which such resolution shall have been passed, but shall not affect or prejudice the rights of any other creditor."

This statute consists of twenty-one sections, the last section of which repeals all acts inconsistent therewith.

The names of the defendants in error, and their addresses, and the amounts due to them respectively, were duly shown on the statement referred to; and there can be no doubt that they were creditors of the plaintiff in error.

"Creditors here (in composition) plainly mean all persons who have provable debts in bankruptcy."

Judge Lowell, Lowell's Decisions, Vol. 2, p. 506.
In re Schwartz (U. S. C. C.), 15 Nat. Bank. Reg. 330.
Bamberg *et al. v.* Stern (N. Y. Com. Pleas), 18 Nat. Bank. Reg. 74.
Wells *v.* Lamprey, 58 N. H. (Supreme Court), 16 Nat. Bank. Reg. 205.
In re Shafer *et al.*, 17 Nat. Bank. Reg. 116.

In re Schwartz (*supra*), Judge Johnson said, "Where a claim originated in contract, although fraudulently induced, and is prosecuted sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery."

The claim of defendants in error arose on a contract, and the amount of it was a certain and definite one, — for goods for an agreed price, — and correctly stated on the debtor's statement, produced at the meeting of his creditors. That

they did not attend these meetings at the Court, or sign the confirmation, did not make them any the less creditors of the debtor.

In re Lissberger (U. S. C. C.), 18 Nat. Bank. Reg. 237.

There is nothing in the Sect. 17 indicating that the word *creditors* there is applicable to or used to describe persons other than it is ordinarly used to describe.

"A creditor is one who has a legal claim against another."

Abbott's Law Dict., Vol. 1, p. 321.

Certainly there is nothing indicating that it was used in the provisions for composition in a more limited or restricted meaning or sense than in regular bankruptcy.

Sect. 5067, Rev. Stats. U. S., provides that all demands against the bankrupt on account of said goods or chattels wrongfully taken, converted or withheld by him, may be proved and allowed as debts in bankruptcy; and Sect. 5117, Rev. Stats., provides that debts created by fraud may also be proved. If the defendants in error could have proved their claim, they were "creditors" of said debtor.

In re Scott, Collins & Co. (U. S. Dis. Ct.), 18 Nat. Bank. Reg. 74.

Williams on Bankruptcy, 2d Ed. 161

In re Rodger *et al.* (U. S. Dis. Ct.), 18 Nat. Bank. Reg. 252.

In re Jordan, 2 Federal Reporter, 319, and cases cited.

The description of those whom it is declared the composition shall bind is certainly broad enough to include the defendants in error. The force, or scope, of a composition is nowhere limited to those who took part in the proceedings, or to those only whose claims might be barred by a discharge in bankruptcy under the Act of 1867. Nor is it anywhere suggested that such composition is not intended to cover or

include fiduciary debts or debts created by fraud. A limit has been placed upon the power of secured creditors, but beside these and certain creditors who are entitled to priority, there is in a composition only two other classes of creditors, viz., those whose names are shown on the statement, and those whose names are not shown there. The latter class are even spoken of as "creditors" as well as the former.

Yet it is claimed that such composition ought by construction to be held to be limited to such debts or actions as would or might be barred by a certificate of discharge under the original bankrupt law of 1867, or Title 61 of the Revised Statutes of the United States; because they say, the said statute of June 22, 1874, is declared to be an "amendment of the Bankrupt Act; and a composition under it is a substitute merely for the ordinary proceedings in bankruptcy, and a discharge therein. But said statute is also declared to be to "supplement" the Act of 1867, "and for other purposes." What may or may not have been intended by "supplement," or may or may not be included in the words "and for other purposes," we think it is clear that little, if any, weight or notice should be given to the *title* in the interpretation of any part of the body of the statute. It is a matter of common knowledge that many things having no relation to, or congruity with, the subject mentioned in the title, are frequently found in the body of an Act.

Hadden *v.* The Collector, 5 Wallace, 107.

Kent, Com., Vol. 1, Part 3, page 460, 12 Ed., says that while titles may at times aid in the construction of a statute, they are generally loosely and carelessly inserted, and are not safe expositors of the law. Smith's Commentaries on Statutory and Constitutional Constructions, Sect. 557, says: "But as the title is usually drawn without much deliberation, unless it points with great precision to the object and scope of the Act, it must always be regarded as a very unsafe and unsatisfactory expositor of law. It is seldom that it

alludes to the subject-matter of the Act; and even in cases where it does so, it is in general and sweeping terms, embracing within its scope not more than one or two multifarious matters, to which the enacting part extends; and it will be found in almost all cases that the enacting part goes much beyond either the title or preamble."

"The extreme conciseness of an ancient statute," said Lord Brougham, in Gwynn *v.* Burrell, 1 Scott, N. R. 818, "was the sole ground for that sort of legislation put upon statutes. . . . Old Acts of Parliament are framed with generality and conciseness. In modern statutes the Legislature is careful to express all it intends and in so many words that, to go beyond their necessary implication, is to make and not to interpret law."

See Reg. *v.* Rose, 6 Q. B. 157.

It may be noticed also that this Sect. 17, containing all the provisions for a composition, is expressly stated to be an "addition" to Sect. 43 of the original Bankrupt Act of 1867, now Sect. 5103 of the Revised Statutes. This Sect. 17 is introduced and designated in the body of the Statute of June 22, 1874, as follows: —

"*Composition with Creditors.*

"Sect. 17. That the following provision be added to Sect. 43 of said Act" (the act of 1867). Said Sect. 43 is that in which provision was made for settlement of estates by trustees, which is there expressly declared to be a provision "superseding the bankrupt proceedings by arrangement."

II.

Is a composition under Sect. 17 of the Act of June 22, 1874, a substitute merely for the discharge under the original Act of 1867, and for the ordinary proceedings in bankruptcy? The language of Sect. 5117 of the Revised Statutes is that no debt created by fraud, etc., shall be discharged by "proceedings in bankruptcy."

But we think that no inference should be drawn from the words "proceedings in bankruptcy," which now appear in Sect. 5117 of the Revised Statutes, different from that which would be derived from the words "under this Act," in the original Bankrupt Act (Sect. 33) of 1867, for which the former were substituted in the revision.

It is obvious that this verbal change was made necessary by the revision, for the propriety of language, and there is nothing in it indicating any intention to change the meaning, scope, or policy of the law. It is not one of those cases where the commissioners have collated and consolidated different statutes for the purpose of harmonizing them, and revising the whole. It is not like the case of the United States *v.* Bowen, 10 Otto, 508, but it was a change of words (like a change of a name while the thing remains the same) in the interest of the proper use of language. It was impossible to retain the words "under this Act," after the Act had lost its identity in the revision. May it not be fairly said, that it is within the spirit of Sect. 5600 of the revision, which provides in effect that the arrangement of the several sections thereof, made for the more convenient and orderly arrangement of the same, shall not lead to a presumption or inference of legislative construction?

If a change in the arrangement of sections in the revision shall not lead to any such inference, how can this change of words in a section, made necessary by such change of arrangement, lead to such inference?

See opinion of the District Court of the Southern District of New York *In re* Rodger *et al.*, 18 Nat. Bank. Reg., p. 254.

It is also to be especially observed that by Sect. 5601 — the last section of the Revised Statutes — it is provided that "the enactment of the revision is not to affect or repeal any Act of Congress passed since the first day of December, 1873," thus expressly declaring that the revision, as such revision, is of no significance in the construction of any Act or statute passed *after that date*.

It is of no significance or importance either that the revision was approved June 22, 1874; because it is declared in Sect. 5601 thereof that all Acts passed since Dec. 1, 1873, are to have full effect as *if passed after* the enactment of the revision; "and so far as such Acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion inconsistent therewith."

It is therefore clear that the provisions for composition contained in Sect. 17 of the Act of June 22, 1874, and Sect. 5117 of the Revised Statutes, *are not to be regarded or considered as contemporaneous statutes*, or as having been passed by the same Congress. The latter is the expression of the legislative will and policy in 1867, and the former the expression of that will seven years later by another Congress.

These facts are important in view of the reasons stated by the courts for their conclusions and decisions in the cases of Mudge *v.* Wilmot, 124 Mass. 493, and Lilly *v.* Strasberger, 14 Hun. (N. Y.) p. 120, in which cases both those learned courts apparently overlooked these facts and dates, and regarded, for the purposes of construction, Sect. 5117 of the Revised Statutes, and Sect. 17 of the Statute of June 22, 1874, as contemporaneous Acts, which partly led, we believe, to the erroneous conclusions as to the scope and force of said Sect. 17 in those cases.

In re Rodger *et al.*, 18 Nat. Bank. Reg. p. 255.
Bamberg *et al. v.* Stern, 18 Nat. Bank. Reg. 74.

III.

Yet it is said that these statutes must be construed together, and if possible made to harmonize, because they are *in pari materia*. The force of this rule of interpretation of statutes is not denied where it is applicable, though what force shall be given to it in any case depends upon the facts of that case. Is Sect. 17 of the Statute of June 22, 1874,

containing the provisions for composition, *in pari materia*, with the original Bankrupt Act of 1867, or with the provisions found in the Revised Statutes relating to bankruptcy?

That the former relates in some sense to the "subject of bankruptcies," mentioned in the Constitution of the United States, may be true, in the sense that it is the subject of the relation of debtor and creditor, and the adjustment of their relations and their relief. But beyond a possible reference to a most general head or title, they have nothing in common. Beyond, or after, the filing of a petition in the clerk's office of the District Court, the provisions of the one have no application to proceedings under the other; no step or proceeding in composition is any step or proceeding under any provisions of the Revised Statutes, or *vice versa*. In composition under said Sect. 17, no adjudication in bankruptcy is necessary, no order whatever is necessary, to be made on the petition filed; the order for the first meeting of creditors is issued on the offer or proposition of the debtor to pay a *pro rata* percentage in satisfaction of his debts.

There need be no assignee, no assignment; no dividend is paid to creditors; the debtor does not seek or apply for any "discharge"; and what would seem to be conclusive as to the difference in reality, as well as the means of obtaining a composition and a discharge, is that the oath described in Sect. 5113, Revised Statutes, called popularly the oath of conformity, or the oath preliminary to discharge, the condition or *sine qua non* of a discharge, is not required in composition. The conditions of the debtor's relief in one are not the same as in the other; nor is the relief or result the same, but very different. A discharge is a thing which may be set up, like the Statute of Limitation, in bar of an action. Composition is a satisfaction and extinguishment of the debt.

In Wells *v.* Lamprey, 58 New Hampshire (16 National Bank. Register, 205), the Supreme Court of that State said, referring to one who had made a composition with his creditors under Sect. 17: "He was not discharged, but has settled

with his creditors, the same as if he had gone to each one separately."

In re Lissberger, 18 National Bank. Register, p. 239, Chief Justice Waite says, "The special provision in the Composition Act was not intended as a substitute for this part of the general Bankrupt Act," and that the *pro rata* payment is "for the satisfaction of the debts, and not as a dividend from the estate in bankruptcy."

In re Odell, 16 National Bank. Register, 501, Judge Blatchford said: "'Composition' not being a discharge, the provisions of Sect. 5110" (in regard to granting discharge) "do not apply."

In re Becket, 2 Wood, C. C. Rep. 173, Mr. Justice Woods said: "This settlement, by composition of the affairs of the debtor, in whose case proceedings in bankruptcy have been commenced, does not contemplate a discharge under the Act."

Chief Justice Daly, of the Common Pleas, New York, *In re* Leipziger, said, "My conclusion on this application (that an assignee under a general assignment account should file a bond) is, that the composition is a proceeding distinct and different from the proceedings for a discharge in bankruptcy, and that the construction which has been given by the United States courts to the law, respecting the one, does not necessarily apply to the other."

Am. Insolvency Ct. Reports, Vol. 1, p. 149.
In re Morris *et al.*, 19 Nat. Bank. Reg. 111.

The Court said, "Composition and bankruptcy are both complete systems," . . . "not without the most miscellaneous confusion of two entirely different proceedings can anything be done, or at any time, in composition proceedings, be called any step of the proceedings in bankruptcy resulting in a decree for discharge."

In re Proby, 17 Nat. Bank. Reg. 175.
~~Keine v. Graff~~, 19 Nat. Bank. Reg. 313.
In re Bayley et al

It has been held in many cases, that a composition may be made where a discharge could not be obtained, and even where a discharge has been refused.

In re Haskell, 11 Nat. Bank. Reg. 164, Judge Lowell says: "I do not believe the statute intends that no debtor can compound with his creditors under this section, who would not be able to obtain his discharge."

Judge Blatchford, *In re* Odell, 16 Nat. Bank. Reg. p. 501, says: "The mere fact that a bankrupt has been refused his discharge, is not an absolute bar to a composition."

In re Morris et al, 16 Nat. Bank. Reg. p. 114

In many cases, for example, a debtor who has not kept proper books of account, or who has made preferences, may have a composition, who could not get a discharge in bankruptcy.

In Wilson *v.* Breslauer, L. R. Appeal Cases (House of Lords), Vol. 3, p. 700, Lord Blackburne, referring to the effect of such composition, said: "It is a very different thing from an order of discharge."

This distinction is important because it appears not to have been observed in many cases cited by defendants in error.

For instance, in Leggett *v.* Barton, 11 Vroom (N. J.), 83, while it is there admitted that the language of Sect. 17 of the Statute of 1874, "if standing alone," is "broad enough to embrace fraudulently contracted debts and discharge them," the logic of the decision is that a composition "operates to discharge a debtor from his debts, and having this force, it is clear that it is a proceeding in bankruptcy"; that as, by Sect. 5117, Revised Statutes, a discharge by proceedings in bankruptcy does not discharge a fraudulently contracted debt, therefore a composition does not. As if anything having the force of a discharge must be a discharge, and must also be a proceeding in bankruptcy! As if also the power of Congress was exhausted by the Bankrupt Act of 1867. or by the provisions found in the Revised Statutes!

and that Congress *could not* provide that such a debt could or might be discharged!

Composition and a discharge under regular proceedings in bankruptcy are not the same thing, as we have seen, and they do not have the same force or effect. A fraudulently created debt may be proved in bankruptcy and a dividend received on account, and the creditor may then sue for and recover the balance, notwithstanding a discharge, but in composition this cannot be done; the receipt of the *pro rata* payment here is a *satisfaction* of the whole claim and debt; no right of action remains to any creditor who comes in here and accepts the offer for any balance; the whole claim, whatever it was, is extinguished. No "dividend" here can be paid "*on account*" of the debt. And does not this fact show that Sect. 5117 of the Revised Statutes is not applicable, and cannot be applied to proceedings in composition?

Is there any ground for holding that where one part of the section cannot apply that the other part does, or should?

That one result of a composition is the same as that of a discharge, that it may be used in bar of an action against the debtor, proves nothing. The Statute of Limitations, for example, may be so used; but no one would say that the Statute of Limitations is similar to or is *in pari materia* with either composition, or a discharge in bankruptcy.

Sect. 17 of the Statute of June 22, 1874, is not *in pari materia* with the original Bankrupt Act, or with the provisions of Title 61 of the Revised Statutes; but said Sect. 17 contains completely a new, separate and distinct method of treatment of the relations between debtor and creditor and the estate of the debtor. It is in the nature of a new remedy for both debtor and creditor. It was a new provision and principle not within the purview or contemplation of the Statute of 1867, or of the Revised Statutes; introduced for the first time in 1874, intended, of course, to change the existing law; and as such is entitled to an independent and, as a remedial statute, a liberal construction.

Potter's Dwarris on Statutes and Constitutions, p. 155.

The case of United States *v.* Fisher *et al.*, 2 Cranch, 359, is much in point in the case at bar. The chief question there was whether the United States, as a creditor of a bankrupt, was entitled to priority of payment before the general creditors out of the bankrupt's estate. The United States relied on Sect. 5 of the Act of March 3, of 1797. It was admitted that by Sects. 1, 2, 3 and 4 of the same Act, the United States was expressly, in some form of words, limited in its right to such priority to certain classes of debtors (viz., in general, receivers of the public money); but in Sect. 5 those words were omitted, and the words "or other person hereafter becoming indebted to the United States, by bond or *otherwise*," were used; and "The great effort of the defendants," said Chief Justice Marshall, "is to connect the fifth with the four preceding sections, and to prove that, as the general words in these sections are restricted to debtors of a particular description, the general words of the fifth section ought also to be restricted to debtors of the same description." He proceeded to state the object of the previous sections, then says, "The fifth section is totally unconnected with those which precede it. Regulations of a suit at law no longer employ the mind of the Legislature; the preference of the United States to other creditors becomes the subject of legislation," and rendered the opinion of the Court that the words describing debtors in the four previous sections did not control the plain language of the fifth, and that the United States was entitled to the priority of payment out of the estates of all bankrupts. That was a stronger case in many respects for the defendants in error, than for the defendants in error in the case at bar; but the Court held to the plain words of the body of the statute, regardless of its title, of previous provisions, or supposed policy of the Legislature.

Nearly the same question arose *In re* Lewis, Trustee, *v.* The United States, 14 Nat. Bank. Reg. 65, involving the construction of the same law, and it was again held that the

general words of Sect. 5 must control. Mr. Justice Swayne there said, "Where the language of a statute is transparent and clear, there is no room for the office of construction."

IV.

But even if the provisions for composition can be said to be *in pari materia* with the provisions of Title 61 of the Revised Statutes, the rule of construction referred to does not go to the extent of requiring plain words of a *later* statute to yield.

In Goodrich *v.* Russell, 42 N. Y. 177, the Supreme Court of New York said: "The rule *in pari materia* does not go to the extent of controlling the language of the statute by the supposed policy of a previous enactment."

In Ingalls *v.* Cole, 47 Me. 530, the Supreme Court of Maine said: "Such statutes (*in pari materia*) cannot be resorted to where the language of the later Act is plain and explicit."

In Rich *v.* Keyser, 54 Penn. St. Rep. 89, the Court says: "The words of a statute when unambiguous are the true guide to the legislative will; that they differ from the words of a prior statute on the same subject, is an intimation that they are to have a different and not the same construction; for it is as legitimate a use of the legislative power to alter a prior statute as to displace the common law. Every Act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment."

Dean of Ely *v.* Bliss Beavan, 582, quoted in Potter's Dwarris on Statutes and Constitutions, p. 155.

V.

The case at bar, as to what creditors are within the scope and effect of a composition, does not present a case for "the office of construction." There is no uncertainty or ambiguity

in the language used. The words "to each known creditor," "all the creditors of the debtor," "the provisions of a composition accepted by such resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor, produced at the meeting at which the resolution shall have been passed," are neither uncertain nor ambiguous. Taken in their ordinary sense, they create no conflict or no absurdity. They create no conflict, because no proceeding in one is any proceeding in the other, and a discharge could be obtained after the provisions for composition became law, precisely the same as before, and with precisely the same effect; to no absurdity, because the Act is founded on equity and "equality, which is equity," and on the principle of natural justice, that where a number of persons have a common interest or cause, they shall have the right to say what shall be done.

Bump on Composition in Bankruptcy, p. 1.

It cannot be doubted that Congress had the power to provide that a debt created under the circumstances stated in the "defendant's exceptions" page 8 of record, as well as any other, could be discharged in bankruptcy or barred by a composition; that Congress had or had not done so in such form of proceedings prior to this statute is of little or no significance; nor is what may be supposed to have been the general policy of bankrupt laws in past times of any importance. From the time of 34 and 35 Henry VIII., the time of the first Bankrupt Act in England, to 5 George II., the debtor was not relieved from his liability under any circumstances.

For two centuries a bankrupt in England was treated as a criminal by laws hardly less inhuman than the laws of the twelve tables.

See 2 Blackstone, Com. 472.

This extreme rigor of the law against debtors has been from time to time relaxed, and by Sect. 9 of the Act of Congress, approved June 22, 1874, a debtor, in the case of in-

voluntary bankruptcy, could receive a discharge from liability without having any assets, and without paying any dividend, and without the assent of any creditor!

Judge Choate, in Rodger *et al.*, 18 Nat. Bank. Reg., p. 259, said: "The rigorous policy towards debtors evident in the Act of 1867 is entitled to little weight in the construction of the Act of 1874, and cannot for a moment avail to wrest from their obvious effect and meaning the language of the late Act"

The case at bar is not one admitting of construction by any supposed policy of the Legislature.

Goodrich *v.* Russell, 42 N. Y. 177.

Nor is it a case calling for outside aid for the purpose of interpretation on any ground.

Smith on Statutory and Constitutional Construction Com., Sect. 478, says: "The first general maxim laid down by this writer (Vattel) is, that it is not allowed to interpret what has no need of interpretation."

Potter's Dwarris on Statutes and Constitutions, p. 143.

"Where," said the Court, in Rex *v.* Ramsgate, 6 B. & C. 712, "the Legislature has used words of plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the Legislature did not mean what it has expressed."

In Green *et al. v.* Wood, 7 Q. B. Rep. 178, Lord Denman said: "We are bound to give to the Acts of Legislature all possible meaning which is consistent with the language used. But if we find language used which is incapable of meaning, we cannot supply one. It is extremely probable that the alteration suggested would express what the Legislature meant; but we, looking at the words as judges, are no more justified to introduce that meaning, than we should be if we added any other provision. We can do no more than give such meaning as the words authorize."

In Samuel *v.* Nettleship, 3 Q. B. Rep. 188, Patterson, J.

said: "I cannot speculate as to the intention of the Legislature; the words appear to me to be quite plain."

In the case at bar the maxim *Expressum facit cessare tacitum* applies. The Legislature undertook to define and declare who should be bound, and there is no room for arriving at it by implication or inference.

The case of *Ex parte* Trafton, cited in the opinion of the Massachusetts Court in Mudge *v.* Wilmot, is not an authority that the debt of Wilmot was not provable; on the contrary, so far as it goes, it is an authority the other way. The same may be said of the case *Ex parte* Halford, L. R., 19 Eq. 436, cited in the same opinion; and neither is an authority that an action on a debt created by fraud is not barred by a composition under our statute. For by Sect. 15 of the "Debtors' Act" of England, of 1869, it is there expressly declared that such claim or debt shall not be affected by such composition except to the extent of the amount received as a dividend. The English Act providing for composition, from which ours is largely taken, is in that of 1869; "and Sect. 15 of the Debtors' Act," though passed the same year, refers expressly to such composition and controls it.

32 and 33 Victoria, Ch. 62, Sect. 15, 1869.

See *Ex parte* Halford, L. R., 19 Eq. 436, and note.

An examination of the cases of Libby *v.* Strasburger, 14 Hun. N. Y. Supreme Court, 120, and Talcot *v.* Harris, 18 Hun. N. Y. Supreme Court, 567, will show that Judges Ingalls and Brady labored under the same errors in regard to the effect of the revision of the United States Statutes, the dates of the Acts and the provable character of the claim and the effect of composition, as did the Court of Massachusetts. We have been unable to find that the Court of Appeals of that State (New York) has anywhere passed upon the questions here presented.

Is it not presumable that if Congress had intended to limit the effect of composition under the Statute of 1874 to the same debtors or creditors as composition in England is lim-

X Rec'd. 28

ited, they would have said so; and is not the fact that no such limitation of its effect is mentioned in our law significant that Congress did not intend so to limit it?

VI.

Every one has also felt the injustice and wrong which it was in the power at common law of a single obstinate creditor to hinder or defeat advantageous settlements and compositions of the affairs of insolvent debtors. The law permitted it, but it was contrary to equity and justice. "Equality is equity"; nothing can be more equitable or just than that those who have a common interest or object shall have the right to prescribe the course of action to be pursued. To remedy this wrong, to limit or take away this veto power from factious creditors in such cases, was one of the objects of this statute; and the Legislature justly and properly gave it to, and left it with the creditors and the Court, under proper restrictions, to decide the matter, subject to the condition that the Court shall be satisfied that it is "for the best interest of all concerned."

In re Morris Reiman, 12 Blatch. 562.

Despatch in the settlement of insolvent estates, the power of the debtor to pay more than an assignee in bankruptcy out of his assets, the saving of expense, the end of litigation, were other objects sought by this "composition with creditors," but none of these objects could be gained, if, by a convenient metonomy, factious creditors can, by declaring in tort instead of contract, avoid the law. But aside from this there is no reason why such claims as that of the defendants in error should not be barred. A certificate of discharge in bankruptcy is a bar to many debts, in the creation of which there is as much moral turpitude as in the debt in the case at bar.

Woodward *v.* Towne, 127 Mass. 41.
Chapman *v.* Forsyth, 2 Howard, 202.
Bissell *v.* Conehane, 15 Ohio, 38.
Phillips *v.* Russell, 42 Me. 360.

There is no such course of legislation on this subject in this country, as that any one can say what is or is not the "policy" of the law. Neither by the Bankrupt Act of 1800, nor by that of 1841, of the United States, were debts created by fraud excepted or exempted from the effect of the certificate of discharge therein provided. Under each of those Acts, it was understood that all claims or debts *provable* were discharged.

Sect. 34 of Act approved April 4, 1800.
" 4 " " August 19, 1841.
Hillard on Bankruptcy, p. 281.

"The criterion to determine what the certificate will bar, is what can or cannot be proved."

Cooper's Bankrupt Law, p. 358.

That Congress, by these provisions for composition in Sect. 17 of the Act of 1874, intended to include such creditors as the defendants in error, having a certain definite liquidated claims for property, we believe, because *they have said so, in plain, clear and unambiguous language.* It is only when we misapply the rule of construction referred to, and look outside of the statute, that any question or doubt arises.

The Legislature not only used the words "all the creditors," but proceeds to describe them particularly; to wit, "all those creditors whose names," etc., "are shown on the statement," etc., and then provides that it shall "not affect or prejudice the rights of any other creditor"; and this indirectly though as strongly declares that it shall affect the rights of the creditors whose names, etc., *are* shown on such statement.

The Court is required, before ordering the resolution to be recorded, to pass upon the best interest of *all concerned.* Were not the defendants in error "concerned"? They had no security (see p. 7 of record). Whatever their claim was, if enforceable in law or equity, they were "concerned." What is the sense in requiring the

see Hadden v Collier 5 Wall 107.

Court to regard their interest unless they and their interest are to be affected by it? and why should they be counted and their claim estimated in determining whether the number and amount in value of all the creditors required to make the resolution operative unless they were to be affected by it? There is nowhere in the proceedings any intimation that '*creditors*" means less or otherwise than what that word means ordinarily.

It would seem to be right, if a debt shown on the statement is one that is *properly* counted and considered by the register and the Court, that it should be bound by the judgment; but must it not be presumed and taken to be such a debt, *if it is in fact a debt*, and honestly and in good faith, in the absence of any objection, it appears on the statement and so remains? *Could* the register, or the other creditors, or the Court in these proceedings, try and finally determine the question, if raised, whether it was a debt created by fraud or otherwise? There is no provision for determining there such a question. There is a provision for there determining the amount of security held by any creditor, but none for determining or trying the question whether or not a debt shown on the debtor's statement is or is not of one character or another, or of a kind mentioned in Sect. 5117. Does not this indicate that it was not intended that such a question should arise there?

VII.

Are these defendants in error not bound by the judgment of composition?

They could have come in, voted for or against the resolution, or have objected to their names and claim being represented there; if they did not desire to appear as parties to the record and to the judgment, they could have objected, and could have moved that their names be struck off the statement, at all events they could have taken such action as not to allow the Court, and other creditors and the debtor to act in ignorance of their intention and claim: The

debtor *must* put their names on his statement. Under the English Act it would be a fraud not to do so. (See Salaman on Liquidation and Composition with Creditors under the English Act of 1869, pp. 140, 141.) But their names were there, they had due notice to appear, but did not; they allowed (they *assented*, in legal effect) that they should be represented and counted as creditors, and that their claim should be counted in the determination of the question of the requisite number and value in amount. They and their "interest" have been considered and involved in a judgment by a court of competent jurisdiction of the subject and the parties. Are they not bound by it so long as it stands? Is it not *res adjudicata?* Can they now get more than the forty-five per cent which the Court adjudged should be paid to them; which the debtor has paid to his other creditors in the belief that the defendants in error assented to take it also?

In Pool *v.* McDonald, 15 Nat. Bank. Reg., p. 562, where one who took no part in the composition proceedings subsequently applied for a review and reversal of the composition, Mr. Justice Swayne said: "It is very doubtful whether this present contestant could stand by and look over the battle field and witness the contest carried on by others, taking no part therein, and thereafter make himself a party to the proceedings so as to entitle him to be heard on his objections."

In re Wronkow *et al.*, 18 Nat. Bank. Reg., p. 84, where there was a petition to set aside the composition, the petitioners did not attend the first meeting of creditors, Chief Justice Waite said: "For some cause satisfactory to themselves they stayed away"; and after stating the history of the meetings, etc., he said, "if creditors interested in composition proceedings fail to attend to their interest in time, they must not expect the courts to relieve them from the consequences of their neglect, except they make a clear case for equitable interference in their behalf."

See Paret *v.* Ticknor, 4 Dillon, 111.

In Wilson *v.* Breslauer, p. 704, *supra*, Lord Blackburn said: "I do not think there is any distinction between assenting and non-assenting creditors; when a resolution has passed, it is binding as much and no more on those who came in and assented as those who came in and opposed, and it as binding, as much and *no more*, upon those who came in and assented as those who stayed away."

As the judgment stands, could not the defendants in error sue for as on a *judgment*, and recover the forty-five per cent? and if a judgment as to one party, is it not as to both? At least, should not they be estopped from denying the validity and force of such judgment in a collateral suit?

Bigelow on Estoppel, pp. 19, 20, 500.

In Home National Bank *v.* Carpenter, 129 Mass. 1, the Court said of a creditor who had taken no part in the composition proceedings: "It is not open to a creditor who would otherwise be bound by it to impeach its operation collaterally by an action on his original debt."

See also Farwell *v.* Raddin, 129 Mass. 7.

There are many cases where creditors who have agreed or consented by word or conduct to enter into composition at common law with debtors, on the faith of which the debtor has acted, have been held to be estopped and bound the same as if they had signed. (See Bump on Composition at Common Law, pp. 6 and 7, note and cases cited.)

To the suggestion that if proceedings in composition are not "proceedings in bankruptcy," they are unconstitutional, we say that by no means follows. Exactly what the "subject of bankruptcies," on which Congress, by express provision and the Constitution has power to pass laws, has not been decided; but is it anything more that the treatment of the relations of an insolvent debtor and his creditors, and how? Certainly the Constitution does not prescribe the means, manner or method of treatment or management of

that subject. And "it must be said," said Judge Blatchford, *In re* Morris Reiman *et al.*, 11 Nat. Bank. Reg., p. 41, "that these statutory provisions for composition are not open to the objection that they are not warranted by the Constitution.'

Also opinion of Mr. Justice Hunt in same case, 12 Blatch. 562.

VIII.

The Chief Justice, in the opinion of the Court given in the case at bar (124 Ms. Rep. 493), as the reasons for its judgment there, said: —

"These words," referring to the words descriptive of the debts and creditors whom composition shall bind under Sect. 17 of the Statute of 1874, "certainly do not include debts, though appearing on that statement, which are not provable in bankruptcy. *Ex parte* Trafton, 2 Lowell, 505. *Pari ratione*, they affect the rights of creditors whose debts are provable in bankruptcy so far only as they would be affected by a certificate of discharge under the Bankrupt Act."

Is this true? And is it applicable to the case at bar?

The claim held by the defendants in error against Wilmot *was a debt provable in bankruptcy.*

If we admit, for the sake of the argument, that a debt created by fraud may be proved in regular bankruptcy and a dividend received, and yet be affected so far only as such dividend, can it be said, *pari ratione*, that such a debt is affected to that extent only in composition? It is not possible that any part of a claim or debt on which the creditor has received a *pro rata* payment in composition can survive the composition so that the creditor can maintain an action for the original debt less the amount received. For instance: the defendants in error could have come in, voted at the meeting, or signed the confirmation and received the *pro rata* payment. If they had done so and received the forty-five per cent payment, could they have maintained an action for the other fifty-

five per cent of the debt? Clearly not. And does not this show the difference between them; and that what in this respect may be said of one cannot, *pari ratione*, be affirmed of the other? Does not this fact break the force of the logic of the Massachusetts decision? Does not this furnish an answer to the suggestion that it is unreasonable to suppose that Congress intended to give a greater force or effect to composition than to a discharge under the regular proceedings? *For it does have a greater force and effect*, and in precisely that *class of debts to which the claim in the case at bar belongs.* This result is inherent in the nature of the composition proceedings, and Congress must have intended it.

There is no reason why such a debt as this should not be bound by a composition as well as any other debt. It is of as much interest and benefit to the majority of the creditors of an insolvent debtor, that such a debt shall be so bound as any other. It is not the interest of the debtor only, nor the interest of one creditor only, which this statute regards, and it is only when it is for the interest of *all* that a composition can be made; and therefore, when made, binds all.

Considering the safeguards and precautions which the Legislature has made, so that the law for such composition cannot be used by the few to the injury of the many, or by the many to oppress the few, that it cannot be made in any case without the sanction of the Court, upon its judgment that it is for the best interest of all concerned, we believe that it ought to have, and that it was designed to have, a wider scope and effect than the strict and regular proceedings and discharge in bankruptcy, and that this effect is not limited to creditors only who take an active part in the proceedings and take the *pro rata* payment.

A settlement under this statute for composition has the essential features and effect of a composition at common law; an offer of *pro rata* payment to all creditors and an acceptance by them, the [illegible] being only the means or [illegible] of treatment or [illegible]

ing the assent and acceptance of every creditor individually, the statute declares in effect that the body of the creditors and the Court, within certain safe limitations, may do this; that this, in legal effect, shall be a substitute for such acceptance of each creditor; and it therefore follows that this composition ought to be held binding on all creditors who might have accepted such compositions at common law; and it should be compared, in its effect at least, to a composition at common law rather than to a proceeding in bankruptcy. This statute, Sect. 17, in plain, unambiguous terms, in language of no obscurity or of doubtful meaning, declares that the composition shall be binding on certain described creditors, among whom are the defendants in error. All other parts of this section indicate that effect. It is the latest statute on the subject; and there is no rule of interpretation by which we are authorized to construe those terms and that language to mean anything other than what they so plainly express.

James B. Richardson
Edwin B. Hale
Counsel

Sect. 15 of the English "Debtors' Act," 32 and 33 Victoria, 1869, Chapter 71 : —

"Where a debtor makes any arrangement or composition with his creditors, under the provisions of the Bankruptcy Act, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof, before the date of the arrangement or composition, he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition, otherwise than by proving his debt and accepting dividends."

OFFICE SUPREME COURT U.S.
FILED
MAR 3 1961
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

NO. 247.

HARVEY B. WILMOT, *Plaintiff in Error,*

v.

ENOCH R. MUDGE ET AL., *Defendants in Error.*

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR DEFENDANTS IN ERROR.

Supreme Court of the United States.

NO. 247.

HARVEY B. WILMOT, *Plaintiff in Error,*

v.

ENOCH R. MUDGE ET AL.

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT.

This was an action of tort to recover damages from the defendant for obtaining goods from the plaintiffs by false and fraudulent representations. The defendant denied making any false representations, and relied upon a composition in bankruptcy as a bar to the suit. It was not contended that the proceedings in bankruptcy were irregular, but the plaintiffs took no part in them and refused to accept the amount of the composition. The Court found that the allegations in the plaintiffs' declaration were true, ruled that the composition was no bar, and entered a verdict in favor of the plaintiffs for the amount of the damages claimed.

Record, pp. 2, 3, 4, 8, 9.

The only question raised by the writ of error is whether the composition in bankruptcy is a bar to the suit.

ARGUMENT.

A claim for damages sustained through the fraud of the bankrupt is not discharged by a composition in bankruptcy.

I.

Such a claim is not provable in bankruptcy.

The Bankrupt Act of March 2, 1867, Sect. 19, provided, —

"That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest."

There follow certain provisions, not material to this case, referring to contingent claims, and for the assessment of unliquidated damages

"arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld,"

and the section ends,—

"No debts other than those above specified shall be proved or allowed against the estate."

14 Stat. at Large, 525.
Revised Statutes, Sects. 5067–5072.

1. A claim for damages caused by deceit is not a debt.

Where a man is induced by fraud to make a sale of goods, the fraud vitiates the contract, and the seller has his election either to affirm the sale and sue for the price, or to repudiate the contract and bring his action to recover damages for the deceit.

As soon as he elects to repudiate the contract, the relation of debtor and creditor between the buyer and seller is ended, and the latter's claim ceases to be a debt.

Montgomery *v.* Bucyrus Machine Works, 92 U. S. 257.
Donaldson *v.* Farwell, 93 U. S. 631.
Stewart *v.* Emerson, 52 N. H. 301.

In this case the defendants in error repudiated the sale as soon as they discovered the fraud, and elected to bring an action of deceit against the plaintiff in error. They made no proof against his estate, and took no part in the bankruptcy proceedings.

Record, p. 9.

By this election their claim ceased to be a debt, and therefore was not provable as such.

The fact that they might have affirmed the sale, and treated the claim as a debt is immaterial.

Goodtitle *v.* North, 2 Doug. 583.
Parker *v.* Norton, 6 T. R. 695.
Parker *v.* Crole, 2 M. & P. 150.
Dusar *v.* Murgatroyd, 1 Wash. 13.

2. If provable at all, it must be as a claim for damages on account of goods wrongfully taken.

It is submitted that these words are intended to cover cases of wrongful conversion, where the action of trover would be the proper remedy, and not cases where the gravamen of the action is the deceit of the defendant.

Where a party is induced by deceit to buy property and to give in exchange for it other property of greater value, it can hardly be said that his claim for damages is a claim for goods wrongfully taken, and it is submitted that there is no distinction between a case where a man sells his property for other property, and where he sells it for a promise to pay.

In both cases he is induced to part with his property by deceit; in both cases the foundation of his action is the deceit; in both cases the measure of his damages is the value of what he has lost.

This view is sustained by

In re Schuchardt, 15 N. B. R. 161.
Montgomery *v.* Bucyrus Machine Works, *supra*.

II.

Even if the claim is provable, it is a debt created by the fraud of the bankrupt, and to such a debt the composition is no bar.

This conclusion is sustained by the language of the Bankrupt Act

itself, and becomes inevitable when the history and purpose of all legislation on the subject of bankruptcy are considered. It is proposed first to examine the language of the act, and then to present the argument drawn from the history of bankrupt legislation.

A.

The provisions which authorize a composition were introduced into the Bankrupt Act by the Act of June 22, 1874, which became a law on the same day as the Revised Statutes of the United States.

18 Statutes at Large, pt. 3, pp. 178–186.
Revised Statutes of the United States, p. 1092.

This act is entitled

"An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March second, eighteen hundred and sixty-seven, and for other purposes."

Its title shows that Congress intended to amend the existing bankrupt law. When the amending act was drawn and passed, the Revised Statutes had not been enacted and the act of March 2, 1867, was in force. The amending act, therefore, necessarily referred to that act, and when it was passed there is no evidence that Congress had in view the effect which the Revised Statutes might have upon their work. The whole act of June 22, 1874, is framed upon the theory that the act of March 2, 1867, was in force, and it proceeds to amend that act section by section. In order to ascertain the intention of Congress the same theory may be adopted, and the question in this case may be discussed just as if the act of March 2, 1867, had remained in force, leaving for subsequent consideration the effect of the Revised Statutes.

Sect. 43 of the Act of March 2, 1867, provided, —

"That if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the Court may direct, three fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to

certify and report such resolution to the Court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall under the direction of the Court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed; *and such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it;* and the Court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustees shall proceed to wind up and settle the estate, under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, *and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act;* and the said trustees shall have all the rights and powers of assignees in bankruptcy."

Thus far the section has been quoted literally, the portions to which the Court's attention is particularly called being italicized. It provides further for examinations, as in ordinary cases of bankruptcy; gives the bankrupt the right to apply for and obtain a discharge, and directs that if the proceedings for the appointment of trustees fail, the bankruptcy shall proceed "as though no resolution had been passed."

14 Stat. at Large, 538.

It is to this section that the provisions in reference to compositions are added by the Act of June 22, 1874. Sect. 17 of that act, which contains these provisions, begins thus: —

"That the following provisions be added to section forty-three of said act."

It is not necessary to quote these provisions in full. They resemble closely the provisions which have been quoted. The portion of the section on which the plaintiff in error relies is as follows: —

"The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors."

18 Stat. at Large, pt. 3, 182, 183.

By virtue of this act, the provisions regulating compositions became a part of section forty-three of the Act of March 2, 1867, and by the well-settled principles of construction, they are to be interpreted as if they had always formed a part of it.

An amended statute is to be construed as if it were a single expression of the legislative will, as if the statute and the amendment had been passed *uno flatu*, to use the ordinary phrase.

Sedgwick on Statutory and Cons. Law, 2d Ed., 68, 110 *note*, p. 209.

Holbrook *v.* Nichols, 36 Ill. 161, p. 167.

This is the general rule, and the Act of June 22, 1874, contains abundant evidence that Congress had in view this rule when that act was passed. The sections of the original act are taken up one by one, and the amendments are in many cases merely verbal. Thus Sect. 3 provides,—

"That section two of said act be, and it hereby is, amended by striking out, in line ten, the words 'the same,' and inserting the word 'any';"

and many other sections contain amendments of the same nature. A few only would be intelligible if they stood alone. Almost every amendment must be read with the section of the original act to which it is referred or it would mean nothing.

Congress, therefore, clearly had in view the language of the amended sections, and intended that the amendments made by

the Act of June 22, 1874, should take their places in the original act, and that the act as amended should be construed together.

The act thus amended contained, then, the language on which the plaintiff in error relies, but it contained also the explicit provision, "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, *shall be discharged under this act;* but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

Act of March 2, 1867, Sect. 33, 14 Stat. at Large, 533.

This language is a perfectly distinct expression of the legislative will. The Court will observe the change of phrase in the two sentences: —

"No debt created by the fraud, etc., . . . *shall be discharged under this act;* and

"And *no discharge granted under this act* shall release, etc."

This makes it clear that Congress did not mean that its prohibition should operate only in cases where a discharge was granted, but did mean that under no circumstances should the Bankrupt Act effect the discharge of a debt created by fraud.

Yet if the plaintiff in error is right, this plain declaration made by Congress with especial reference to debts created by fraud, is controlled by the general language of the later section that the provisions of a composition "shall be binding on all the creditors."

It is to be observed that this later language resembles the language used in the same section about the consent of creditors to the appointment of trustees, which is as follows:

"And such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it."

In cases of composition, the proof of debts is not required, the entry of the creditor's name on the debtor's statement being regarded as equivalent to proof.

Such, at least, is the rule in some districts.

Ex parte Morris, 12 N. B. R. 170.

Bearing this in mind, it is apparent that there is no real distinction between the language

"shall be binding in all respects on any creditor whose debt is provable,"

and the language,

"shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shown in the statement of the debtor,"

and it is probable that Congress meant no more by the latter than by the former.

But if we grant that there is an apparent conflict between two sections in the same statute, and the question is which must yield, it is submitted that the will of Congress in regard to debts created by fraud is to be found rather in the clear and explicit language which is used when the effect of the Bankrupt Act on such debts is the subject directly before them, than in the more general language of another section, in which there is nothing to indicate that Congress had debts created by fraud especially in mind, — certainly nothing which shows an intention to vary the general policy of the act in regard to debts of this class.

This rule of construction has been applied in a similar conflict between the express language on which the defendants in error rely, and general language apparently inconsistent with it found elsewhere in the act.

Sect. 21 of the Act of March 2, 1867, provides, —

"That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt."

14 Stat. at Large, 526.

Sect. 33 provides that no debt created by fraud shall be discharged,

"But the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

A creditor, whose debt was created by fraud, proved the debt, and thereafter sued for the balance. It was claimed that she had waived her right to sue by making proof, but Mr. Justice Nelson, before whom the question was argued, held that the language of Sect. 21,

which standing alone would have barred the suit, was controlled by the stronger language of Sect. 33.

In other words he held that in order to ascertain the intent of Congress in respect to the effect of bankruptcy upon debts created by fraud, it was necessary to look at the section which was framed expressly to declare that intent, and that the express language of this section was not to be controlled by general language used elsewhere *alio intuitu*, however apparently inconsistent.

In re Robinson, 6 Blatch. 253.

Lamp Chimney Co. *v.* Brass and Copper Co., 91 U. S. 656, pp. 662, 663.

It is submitted that the principle of these decisions governs this case.

Andree *v.* Fletcher, 2 T. R. 161, p. 164.

B.

Thus far the case has been argued as if the condition of things had continued which Congress contemplated when the act of June 22, 1874, was passed,—as if, in other words, the act of March 2, 1867, had remained in force.

It is important next to consider what effect, if any, the simultaneous enactment of the Revised Statutes had.

The following provisions of the Revised Statutes are important and may be quoted.

Sect. 5595. "The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the first day of December one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited, as The Revised Statutes of the United States."

Sect. 5596. "All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." . . .

Sect. 5601. "The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of

December one thousand eight hundred and seventy-three, and a acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

Revised Statutes, pp. 1091, 1092.

It is clear from these provisions that the Revised Statutes are to be treated as a legislative declaration of what the law was on December 1, 1873, not as an amendment or repeal of the law then in force. The changes which the commissioners made were mainly in the nature of rearrangement and condensation, intended to make the law clearer, not to alter it, and they were adopted by Congress as having this effect when the Revised Statutes were passed.

The various sections of the Bankrupt Act appeared under the title "Bankruptcy," but their language was retained with slight exceptions.

Sect. 43 of the Act of March 2, 1867, became Sect. 5103 of the Revised Statutes, its language being almost identical. Sect. 33 of the former act became Sects. 5117 and 5118 in the revision. Its phraseology, however, is slightly changed, and the change shows that the interpretation which we have put upon the language of the original act is correct.

The language of the Revised Statutes is: No debt created by the fraud of the bankrupt

"*shall be discharged by proceedings in bankruptcy*,"

where the original act used the words

"*shall be discharged under this act.*"

This declaration of what the original words meant makes it clear that Congress intended that no proceeding in bankruptcy should relieve the debtor from the consequences of his fraud.

By virtue of the language in Sect. 5601, all acts passed after December 1, 1873, "*are to have full effect as if passed after the enactment of this revision.*"

It follows that Sect. 17 of the Act of June 22, 1874, is to be treated as amending Sect. 5103 of the Revised Statutes, which became the new title of Sect. 43 of the Act of March 2, 1867, and is to be construed as an integral part of the title "Bankruptcy."

In re Oregon Bulletin Printing Co., 3 Sawyer, 614.

It requires no argument to show that proceedings which result in a composition are proceedings in bankruptcy.

Should it be claimed that they are not, the answers are obvious, and it is necessary only to suggest them.

1. The composition is either a proceeding in bankruptcy, or it is unconstitutional.

Nothing but the power to establish a uniform system of bankruptcy authorizes Congress to compel creditors to accept a composition at all.

2. The composition derives its whole validity and effect from the action of the District Court sitting as a Court of Bankruptcy.

Its jurisdiction must be invoked by a petition in bankruptcy, because the Act of June 22, 1874, applies only to

"cases of bankruptcy now pending, or to be hereafter pending,"

and the filing of the petition, by the express language of the bankrupt law,

"shall be deemed to be the commencement of proceedings in bankruptcy."

Act of March 2, 1867, Sect. 38, 14 Stat. at Large, 535.
Revised Statutes, Sect. 4991.

The composition meeting must be called under the direction of the Court; the resolution must be presented to the Court; it is of no validity unless it is ordered to be recorded by the Court; and finally it may be enforced or set aside by the Court.

18 Stat. at Large, pt. 3, 182, 183, 184.

3. Indeed, the act itself declares that the composition proceedings are to be deemed proceedings in bankruptcy.

Whether the composition clauses are to be regarded as added to Sect. 43 of the original act, or to Sect. 5103 of the Revised Statutes, in either case they come under the express language found in both: —

"*The winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy.*"

It is therefore clear that the provisions of the amending section take their place in the law as proceedings in bankruptcy, and by the very law to which they are added, it is declared that no proceedings in bankruptcy shall discharge a debt created by fraud.

It is difficult to see how the explicit words of Sect. 5117 can be controlled by anything in the general language of the amending

act. Certainly if Congress had intended that Sect. 5117 should be repealed in cases of composition, some positive statement of this intention would have been made.

C.

No reason has been suggested for supposing that Congress intended to give a composition any greater effect than a discharge.

The Bankrupt Act was intended to secure two objects: the division of the debtor's property among his creditors, and the discharge of the debtor from further liability.

After the amendment, three methods of accomplishing the first object were provided: the property might be distributed either by an assignee, by a trustee, or by the debtor himself if the creditors chose to trust him. In the first two cases, the property was taken from the debtor's control, in the last he retained it; in all, the same result to the creditors was accomplished.

The second object, the discharge of the debtor from his liabilities, was a favor to an honest debtor: hence the provision that debts created by fraud should not be affected by proceedings in bankruptcy.

When the first object, the division of the assets, was effected either through an assignee or a trustee, the debt created by fraud was not discharged. It is difficult to see why this rule should be changed in cases where this division was made by the debtor himself, — why a different method of accomplishing the same result to the creditors should enlarge the effect of the debtor's discharge. There is no necessary or natural connection between the two. In each case the result to the creditors was the same, — they got their share of the debtor's property: they could have no interest in the question whether he remained personally liable for the debt which his fraud created.

Congress cannot have intended to allow a portion of the creditors by their votes to release the bankrupt from a debt created by his fraud, in which they could have no interest, and from which it had never been the policy of the law to relieve him.

D.

Thus far the argument has been founded merely on the language of the Bankrupt Act and the intention of Congress so far as it could be gathered from that act alone.

It is greatly reinforced by a review of the history and purpose of all legislation on the subject of bankruptcy.

The object of bankrupt laws originally was the prevention of fraud, and for two centuries and a half every act that was passed in England had in view nothing more. The proceeding was entirely involuntary. The creditors alone, not the debtor, could set in motion the machinery of the laws. The relief of the debtor was not within their scope. His property was divided, but he obtained no discharge. Bankruptcy and insolvency were far from equivalent terms, and honest debtors were not within the contemplation of Parliament.

These propositions are sustained by an examination of the English statutes, whose policy and purpose are so clearly stated in their preambles that some of the latter are quoted.

The preamble of the first Act, 34 and 35 Henry VIII, c. 4, passed in 1542, is as follows:—

"Whereas divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their duties, but, at their own wills and pleasures consume debts and the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience; be it enacted."

1 Jac. I, c. 15: "For that frauds and deceits, as new diseases, daily increase amongst such as live by buying and selling . . . by such as wickedly and wilfully become bankrupts."

4 & 5 Anne, c. 17, is entitled "An act to prevent frauds frequently committed by bankrupts."

5 Geo. II, c. 30: "And, whereas, many persons have and do daily become bankrupt, not so much by reason of losses and unavoidable misfortunes, as to the intent to oblige their creditors to accept such their unjust proffers and composition, to defraud and hinder their creditors of their just debts."

Blackstone defines a bankrupt thus:—

"A trader, who secretes himself, or does certain other acts, tending to defraud his creditors."

2 Bl. Comm. 285.

A somewhat extended discussion of the policy and purpose of bankrupt legislation will be found in

4th Amer. Law Review, pp. 422. 423, 425–428.

The first law which discharged the debtor from further liability for his debts — the first insolvent law properly so called was 52 Geo. III., Chap. 165, entitled "An Act for the Relief of Certain Insolvent Debtors in England," passed July 30, 1812. This act expressly excepted from the effect of its provisions debts created by fraud.

Its language is quoted: —

"And whereas, many evil disposed persons, to support their profligate way of life, by various subtile stratagems, threats and devices, and under assumed and fictitious name or names for the purpose of obtaining credit, have fraudulently obtained divers sums of money, or securities for money, goods and merchandises, to the great injury of trade and credit, be it enacted that no prisoner who knowingly and designedly, by false pretence or pretences, or under any fictitious name or names assumed for the purpose of obtaining credit, shall have obtained from any person or persons, money, goods, wares, merchandise, bonds, bills of exchange, promissory notes or other securities for money, shall have or receive any benefit or discharge by or under this act."

30 Stat. at Large of Great Britain, 955.

This provision, thus placed in the first insolvent law, has ever since remained a part of the system.

The English law is to be regarded in construing our own.

U. S. *v.* Herron, 20 Wall. 251, pp. 260–262.

The conclusion may be stated briefly.

The object of bankrupt laws is to secure an equal division of a debtor's property among his creditors, and to relieve the debtor from all his honest debts.

A provision which relieves him from any others is a new feature in the system, and an intention to introduce it is not to be inferred from general language in the face of the explicit words which have been quoted.

III.

The view of the defendants in error is supported by the Supreme Courts of New York, Massachusetts and New Jersey.

Libbey *v.* Strasburger, 21 N. Y. Supreme Court (14 Hun), 120.

Mudge *v.* Wilmot, 124 Mass. 493.

Leggett *v.* Barton, 11 Vroom, 83.

Argall v. Jacobs 21 Hun 114

The opposite view has been adopted by the Supreme Court of New Hampshire, the District Court of New Jersey, and the District Court for the Southern District of New York.

Wells *v.* Lamprey, 16 N. B. R. 205.

In re Shafer, 17 N. B. R. 116.

In re Rodger, 18 N. B. R. 252.

Of these last cases, the first two were decided before the decisions by the Supreme Courts of New York, Massachusetts and New Jersey were rendered, and therefore without the aid of those authorities. Their weight is certainly much diminished by the later decisions, in which they are considered and disregarded.

Of all three it may be said that the opinions treat the Act of June 22, 1874, too much as a subsequent and independent act, and do not give full effect to the fact that it was intended to amend an existing law. The Courts construe it as an act *in pari materia* with the original act rather than as an integral part of that act.

Much weight also is given by Judge Nixon to the fact that in cases of composition no formal discharge is granted, while it is obvious that the argument from this fact lays undue stress upon the word "*discharged*," and not enough upon the following words, "*under this act*," or "*by proceedings in bankruptcy*."

The argument as to the policy of the law, which is considered in the last case, is treated as if the Act of March 2, 1867 and the amendment were alone to be considered. The history of bankrupt legislation and the argument which can be drawn from it were not brought to the Court's attention, and it is submitted with respect that the Court's argument as to a change of policy between 1867 and 1874 is

rather fanciful than founded on any real evidence of such a change to be found in the language of the amending act. Had Congress intended to change the policy of the law in regard to fraudulent debts it would hardly have given effect to the change only in cases of composition.

No reason for making a distinction in this respect between cases of composition and cases where an assignee or a trustee is chosen, is suggested in any of the cases; and it is submitted that the weight of authority as well as the strength of the argument is with the defendants in error.

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